

# CRS Report for Congress

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## USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (S. 2271)

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### Summary

The USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, as reported by the conference committee, H.Rept. 109-333 (2005), and agreed to by the House on December 14, 2005, raises the concern of several members of the Senate regarding its protection of civil liberties. To provide the Senate with additional time to consider the conference bill, the 109th Congress enacted legislation delaying the sunset on certain provisions of the USA PATRIOT Act from December 31, 2005, to February 3, 2006 (P.L. 109-160), and then approved another extension of the sunset to March 10, 2006 (P.L. 109-170).

On February 10, 2006, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, S. 2271, was introduced in the Senate. S. 2271<sup>1</sup> amends the Foreign Intelligence Surveillance Act (FISA) and the five federal statutes providing national security letter (NSL) authority to federal intelligence investigators<sup>2</sup> in the following manner: (1) it grants recipients of a Section 215 order the express right to petition a FISA judge to modify or quash the nondisclosure requirement that accompanies such an order; (2) it removes the requirement that recipients of Section 215 orders or recipients of NSLs must provide the FBI or the authorized government authority with the name of the attorney they consulted to obtain legal advice concerning the production order or the NSL; and (3) it clarifies that libraries, the services of which include offering patrons access to the Internet, are not subject to NSLs, unless they are functioning as electronic communication service providers.

Portions of this report are drawn from CRS Report RL33239, *USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Legal Analysis of the Conference Bill*, and CRS Report RS22348, *USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Brief Look*.

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<sup>1</sup> This report examines the provisions of S. 2271 as introduced.

<sup>2</sup> Section 2 of S. 2271 indicates that the bill amends the specified sections of FISA and the NSL statutes *after* they are to be amended by H.R. 3199.

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## Judicial Review of the Section 215 Nondisclosure Requirement

Section 215 of the USA PATRIOT Act<sup>3</sup> amended the business record sections of FISA to authorize the Director of the Federal Bureau of Investigation (FBI), or a designee of the Director, to apply to the FISA court to issue orders granting the government access to any tangible item (including books, records, papers, and other documents), no matter who holds it, in foreign intelligence, international terrorism, and clandestine intelligence cases.<sup>4</sup> A Section 215 order is accompanied by a nondisclosure requirement that prohibits the recipient from disclosing to any other person that the FBI has sought the tangible things described in the order, except to those persons necessary for compliance.<sup>5</sup> Under current law, the recipient of a Section 215 production order lacks an explicit statutory right to petition the FISA court to modify or set aside either the production order or the nondisclosure requirement.

The conference bill accompanying the USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199 [hereinafter “conference bill”], provides a judicial review process for recipients of Section 215 orders to challenge their legality with a specified pool of FISA court judges.<sup>6</sup> However, the conference bill does not expressly grant to recipients of such orders the right to petition the FISA court to modify or quash the nondisclosure requirement imposed in connection with the production order. The conference bill has been criticized for its lack of an express right to challenge the nondisclosure order.<sup>7</sup>

Section 3 of S. 2271 addresses this omission by establishing a judicial review procedure for Section 215 nondisclosure orders that largely resembles the procedure set forth in the conference bill for challenging the nondisclosure order accompanying an NSL.<sup>8</sup>

- For one year after the date of the issuance of a Section 215 production order, the nondisclosure requirement remains in full effect and may not be challenged.<sup>9</sup>

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<sup>3</sup> P.L. 107-56.

<sup>4</sup> 50 U.S.C. 1861(a)(1).

<sup>5</sup> 50 U.S.C. 1861(d). However, the conference bill clarifies that a recipient of a Section 215 order may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI, proposed 50 U.S.C. 1861(d)(1)(B), (C).

<sup>6</sup> Section 106(f) of the conference bill, adding proposed 50 U.S.C. 1861(f)(1), proposed 50 U.S.C. 1803(e)(1) and proposed 50 U.S.C. 1803(e)(2).

<sup>7</sup> 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu) (“I think it is important that we stand for the principle that a restriction on free speech such as a gag order can be objected to in a court of law before a judge. You can at least have your case heard. That does not mean you will win, necessarily, but you can at least have your case heard.”).

<sup>8</sup> Proposed 18 U.S.C. 3511(b)(2)-(3).

<sup>9</sup> By contrast, the conference bill does *not* impose a one-year moratorium on challenging the nondisclosure order accompanying a NSL, proposed 18 U.S.C. 3511(b)(1).

- After this one-year period has expired, the recipient of the production order may petition the FISA court to modify or set aside the nondisclosure requirement.<sup>10</sup>
- Within 72 hours, if the judge assigned to consider the petition determines after an initial review that the petition is frivolous, the judge shall immediately deny the petition and affirm the nondisclosure order.<sup>11</sup>
- If, after the initial review, the judge determines that the petition is not frivolous, the judge shall promptly consider the petition under procedural measures that the FISA court has established to protect national security, including conducting the review in camera.<sup>12</sup>
- The judge has discretion to modify or set aside a nondisclosure order upon a finding that there is no reason to believe that disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person.<sup>13</sup>
- If, at the time the individual files the petition for judicial review of a nondisclosure order, the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, then the FISA judge must treat such government certification as *conclusive* unless the judge finds that the certification was made in bad faith.<sup>14</sup>
- If the judge grants a petition to quash the nondisclosure requirement, upon the request of the government, such order is stayed pending review of the decision to the FISA Court of Review.<sup>15</sup>
- If the judge denies the petition to modify or set aside the nondisclosure requirement, the recipient of the Section 215 order is *precluded* from filing another such petition for one year.<sup>16</sup>
- The FISA Court of Review has jurisdiction to consider a petition by the government or by the recipient of a Section 215 order and to review a FISA judge's decision to affirm, modify, or set aside such production order or the nondisclosure order imposed in connection with it.<sup>17</sup> The U.S. Supreme Court has jurisdiction to review a decision of the FISA Court of Review concerning this matter.<sup>18</sup>

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<sup>10</sup> Proposed 50 U.S.C. 1861(f)(2)(A)(i).

<sup>11</sup> Proposed 50 U.S.C. 1861(f)(2)(A)(ii).

<sup>12</sup> Proposed 50 U.S.C. 1861(f)(2)(A)(ii), proposed 50 U.S.C. 1803(e)(2).

<sup>13</sup> Proposed 50 U.S.C. 1861(f)(2)(C)(i).

<sup>14</sup> Proposed 50 U.S.C. 1861(f)(2)(C)(ii).

<sup>15</sup> Proposed 50 U.S.C. 1861(f)(2)(A)(iii).

<sup>16</sup> Proposed 50 U.S.C. 1861(f)(2)(C)(iii).

<sup>17</sup> Proposed 50 U.S.C. 1861(f)(3).

<sup>18</sup> *Id.*

## Removal of Requirement To Disclose Identity of Attorney Sought To Obtain Legal Advice Regarding a Section 215 Order or an NSL

The conference bill expressly clarifies that a recipient of a Section 215 order or an NSL<sup>19</sup> may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI.<sup>20</sup> The recipient is not required to inform the FBI or the authorized government agency of *the intent* to consult with an attorney to obtain legal assistance; however, upon the request of the FBI Director (or his designee), or upon the request of the government agency authorized to issue the NSL, the recipient must disclose to the FBI or the government agency the identity of the person to whom the disclosure will be or was made.<sup>21</sup>

According to one of the sponsors of S. 2271, this provision of the conference bill might have an unintended “chilling effect” on the individual’s right to seek legal counsel regarding the Section 215 order or the NSL.<sup>22</sup> Section 4 of S. 2271 amends FISA and the five statutes providing NSL authority to federal intelligence investigators to exempt explicitly from the identification disclosure requirement the name of the attorney sought to obtain legal advice with respect to the Section 215 production order or NSL. S. 2271 achieves this exemption by omission (in the case of a Section 215 order) and by explicit language (in the NSL statutes), as described below:

Under the conference bill’s proposed 50 U.S.C. 1861(d)(1), the recipient of a Section 215 order is prohibited from disclosing to any other person that the FBI has sought the tangible things described in the order, except to the following individuals:

- (A) those persons necessary for compliance with the order,
- (B) an attorney to obtain legal advice with respect to the order, or
- (B) other persons as permitted by the FBI Director or his designee.

S. 2271 amends the conference bill’s proposed 50 U.S.C. 1861(d)(2)(C) to provide that the FBI Director or his designee may require any person to disclose the identity of persons

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<sup>19</sup> Five federal statutes, in roughly the same terms, authorize federal intelligence investigators (generally the FBI) to request that communications providers, financial institutions, and credit bureaus provide certain customer information relating to a national security investigation. These statutes are 12 U.S.C. 3414; 15 U.S.C. 1681u; 15 U.S.C. 1681v; 18 U.S.C. 2709; 50 U.S.C. 436.

<sup>20</sup> Proposed 50 U.S.C. 1861(d)(1)(B), (C); proposed 18 U.S.C. 2709(c)(1); proposed 15 U.S.C. 1681u(d)(1); proposed 15 U.S.C. 1681v(c)(1); proposed 12 U.S.C. 3414(a)(3)(A); proposed 12 U.S.C. 3414(a)(5)(D)(i); proposed 50 U.S.C. 436(b)(1).

<sup>21</sup> Proposed 50 U.S.C. 1861(d)(2)(C); proposed 18 U.S.C. 2709(c)(4); proposed 15 U.S.C. 1681u(d)(4); proposed 15 U.S.C. 1681v(c)(4); proposed 12 U.S.C. 3414(a)(3)(D); proposed 12 U.S.C. 3414(a)(5)(D)(iv); proposed 50 U.S.C. 436(b)(4).

<sup>22</sup> 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu) (“[W]e feel the provision in the conference report that required the recipient of a national security letter to disclose the name of their attorney to the FBI was punitive and might have the result of discouraging an individual from seeking legal advice.”).

falling within categories A and C above; notably, it *omits* B, which effectively removes from the identity disclosure requirement attorneys sought for legal assistance.

Section 4 of S. 2271 also amends the five NSL statutes by adding language expressly exempting the identity of attorneys from the disclosure requirement established by the conference bill:

At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under this section shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, *except that nothing in this section shall require a person to inform the Director or such designee of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance* with respect to the request under subsection (a).<sup>23</sup>

## NSLs Not Applicable to Libraries

Section 5 of S. 2271, entitled “Privacy Protections for Library Patrons,” addresses the concern that a library could potentially be subject to an NSL issued under 18 U.S.C. 2709 to obtain certain transactional and subscriber records pertaining to its patrons.<sup>24</sup> 18 U.S.C. 2709 provides NSL authority to the Department of Justice to obtain certain transaction records from electronic communication service providers for counterintelligence purposes. Because libraries often offer patrons the ability to access the Internet, current law is unclear as to whether libraries might be considered “electronic communication service providers” for purposes of 18 U.S.C. 2709. S. 2271 amends 18 U.S.C. 2709 by adding the following section:

“A library ..., the services of which include access to the Internet ... is *not* a wire or electronic communication service provider for purposes of this section, *unless* the library is providing the services defined in section 2510(15) of this title...”<sup>25</sup>

According to one of the sponsors of the bill, this “provision ... makes very clear that libraries operating in their traditional role, including the lending of books, including making books available in digital form, including providing basic Internet access, are not subject to National Security Letters.”<sup>26</sup>

However, if the library “provides” the services described in 18 U.S.C. 2510(15), which are “electronic communication services,” then such library would *still* be subject

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<sup>23</sup> Proposed 18 U.S.C. 2709(c)(4). The language used to describe this exception in proposed 18 U.S.C. 2709(c)(4) is substantially similar to that used in the proposed amendments to the other NSL statutes.

<sup>24</sup> However, a library could still be subject to a Section 215 order under FISA for the production of tangible items such as loan records. S. 2271 does not carve out any exception for libraries under Section 215. For more information on this issue, see CRS Report RS21441, *Libraries and the USA PATRIOT Act*, by Charles Doyle and Brian T. Yeh.

<sup>25</sup> Proposed 18 U.S.C. 2709(f) [emphasis added].

<sup>26</sup> 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu).

to NSLs. 18 U.S.C. 2510(15) defines “electronic communication service” to mean any *service* that *provides* to users the *ability* to send or receive wire or electronic communications. Yet, this definition potentially could include libraries that offer electronic mail access to their patrons, depending on the meaning of the words italicized above. There are few instances in federal law that explicitly provide a definition of “service provider.” For possible insight into the intent of the language used in 18 U.S.C. 2510(15), it may be useful to consult the Digital Millennium Copyright Act, which defines “service provider” as follows:<sup>27</sup>

(A) [T]he term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.

(B) [T]he term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

Although the second of these two definitions is broadly worded and arguably could be used to encompass a library that offers Internet access to patrons, another reasonable interpretation of the foregoing suggests that to be considered an electronic communication service provider under 18 U.S.C. 2510(15), a library must independently operate the means by which transmission, routing, and connection of digital communication occurs.<sup>28</sup> In contrast, a local county library likely has a service contract with an Internet Service Provider (ISP) to furnish the library with the electronic communication service, as many businesses and individuals do; the fact that the library has set up a computer with Internet access for the use of its patrons probably does not, by itself, turn the library into a communications service “provider.” Under this characterization, the actual “provider” of Internet access is the ISP, not the library.<sup>29</sup> Therefore, a public library offering “basic” Internet access would likely *not* be considered an electronic communication service provider, at least for purposes of being an entity subject to the NSL provisions in 18 U.S.C. 2709.<sup>30</sup>

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<sup>27</sup> 17 U.S.C. 512 (k)(1).

<sup>28</sup> A large library affiliated with a university, for example, may function in a capacity similar to an ISP, and thus could be considered a communications provider subject to NSL authority. These libraries may offer their students the ability to post materials on website servers operated by the library.

<sup>29</sup> See 152 CONG. REC. S1390 (daily ed. Feb. 16, 2006) (statement of Sen. Sununu) (“Some have noted or may note that basic Internet access gives library patrons the ability to send and receive e-mail by, for example, accessing an Internet-based e-mail service. But in that case, it is the Web site operator who is providing the communication service — the Internet communication service provider itself — and not the library, which is simply making available a computer with access to the Internet.”).

<sup>30</sup> See 152 CONG. REC. S1390 (daily ed. Feb. 16, 2006) (statement of Sen. Durbin) (“By way of comparison, a gas station that has a pay phone isn’t a telephone company. So a library that has Internet access, where a person can find an Internet e-mail service, is not a communications service provider; therefore, it would not fall under the purview of the NSL provision in 18 U.S.C. 2709. It is a critically important distinction.”).